

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

BUFFALO COUNTY HIGHWAY EMPLOYEES

and

COUNTY OF BUFFALO

Case 60

No. 54356

MA-9646

Appearances:

Mr. Daniel R. Pfeifer, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, Route 1, P.O. Box 333, Sparta, Wisconsin 54656, for Buffalo County Highway Employees, referred to below as the Union.

Mr. Richard J. Ricci, Weld, Riley, Prenz & Ricci, S.C., Attorneys at Law, 4330 Golf Terrace, Suite 205, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, for County of Buffalo, referred to below as the County or as the Employer.

ARBITRATION AWARD

The Union and the County are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The Union requested, and the County agreed, that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute reflected in a grievance filed on behalf of Ken Venus, who is referred to below as the Grievant. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on March 4, 1997, in Alma, Wisconsin. The hearing was not transcribed, and the parties filed briefs by October 21, 1997.

ISSUES

The parties stipulated the following issues for decision:

Did the County violate the collective bargaining agreement by assigning the Gas Man to perform overtime roller operations on Thursday, June 6, 1996, rather than the Grievant?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE IV - MANAGEMENT RIGHTS

Section 1 The Union recognizes the rights and responsibilities belonging solely to the County, prominent among, but by no means wholly inclusive are the rights to hire, promote, discharge, or discipline for just cause. The right to decide the work to be done, and the location of the work. The Union also recognizes that the County retains all rights, powers, or authority that it had prior to this Agreement except as modified by this Agreement.

Section 2 The rights, powers, and/or authority herein claimed by the County are not to be exercised in a manner that will cease to grant privileges and benefits the employees enjoyed prior to adoption of this Agreement and that are not incorporated herein, or in a manner that will undermine the Union or as an attempt to evade the provisions of this Agreement or to violate the spirit, intent, or purpose of this contract.

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ARTICLE V - GRIEVANCE PROCEDURE

Section 1 - Definition of a Grievance

A grievance shall mean a dispute concerning the interpretation or application of this contract.

Section 2 - Subject Matter

Only one subject matter shall be covered in any one grievance. A written grievance shall contain the name and position of the grievant, a complete and concise statement of the grievance, the issue involved, the relief sought, the date the incident or violation took place, the specific section of the agreement alleged to have been violated, and the signature of the grievant and the date. If a grievance affects a group or a class of employees, the Union may submit such

grievance in writing to the Highway Committee directly, and the processing of such grievance will be commenced at Step 3. Such grievance must be signed by an officer of the Union.

...

Section 4 - Steps in Procedure

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Step 3: If the grievance is not settled at the second step, the grievant and/or a representative may submit it to the Highway Committee within five (5) work days following the Commissioner's reply to the grievance. The Highway Committee will further investigate the grievance and submit a decision in writing to the grievant and the representative within ten (10) work days.

Section 5 - Arbitration

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6. Decision of the Arbitrator: The decision of the arbitrator shall be limited to the subject matter of the grievance and shall be restricted solely to interpretation of the contract in the area where the alleged breach occurred. The arbitrator's remedy shall not modify, add to, or delete from the express terms of the Agreement.

...

ARTICLE VII - OVERTIME

Section 1 All hours worked outside the standard work day and/or the standard work week and/or in excess of eight (8) hours per day and/or forty (40) hours per week shall be paid at one and one-half (1 1/2) times the employee's regular hourly rate of pay.

Section 2 All employees shall receive one and one-half (1 1/2) times their regular hourly rate of pay for all hours worked on a holiday in addition to their holiday pay.

Section 3 The Highway Commissioner may require the various work crews or individuals to work overtime in any emergency or when such overtime work will result in eventual benefits or savings to the taxpayers of Buffalo County.

...

ARTICLE XXII - ENTIRE MEMORANDUM OF AGREEMENT

This Agreement constitutes the entire agreement between the parties and no verbal statement shall supersede any of its provisions. Any amendments supplemental hereto shall not be binding upon either party unless executed in writing by the parties hereto. The parties further acknowledge that, during their negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make proposals not removed by law from collective bargaining and that the agreements arrived at are set forth in this Agreement.

...

BACKGROUND

The grievance, filed on June 11, 1996, states the "applicable violation" thus:

Robin Secrist, a nonoperator was told by Joe Wiczorek to roll down a paving job on overtime. (The Grievant) the principle (sic) operator of the roller was not notified but was available to run the roller.

The grievance form does not state a specific contract provision underlying the "applicable violation." David Brevick, the Highway Commissioner, responded to the grievance in a memo dated June 24, 1996, which states:

...

It is in Buffalo County's best interest to have a principle (sic) operator assigned to all Heavy Equipment. This practice insures safety and efficiency. The county intends to continue this practice. From time to time, however, it may be necessary to have other employees operate equipment that has a 'principle' (sic) operator'. The county recognizes this as management's rights.

...

The Union did not agree with this response. Daniel Pfeifer, the Union's bargaining representative, advised Brevick, in a letter dated July 3, 1996, that the Union wished to move the grievance to the next level. His letter states: "Please contact the undersigned to establish

a time and place for the Union to present the grievance to the Highway Committee." Brevick submitted the grievance to the Highway Commission, and summarized its response in a letter dated July 12, 1996. His letter states:

...

This letter is in regard to the Highway Commissioner's decision involving the two current union grievances. The committee discussed both grievances at their July 10, 1996 meeting.

Although both grievances involve separate issues, the underlying problem seems to be that of a principle (sic) operator and the managements (sic) ability to decide who will perform what duties at what time.

In the case of (the Grievant), the fact that there was a misunderstanding about his availability is irrelevant. (The Grievant) is classified as a Heavy Equipment Operator and he signed that posting knowing that operating the roller would be the main duty of that position. That does not exclude (the Grievant) from operating other equipment or exclude other employees from operating the roller. The following is a list of just a few examples of situations were (sic) these exceptions may occur:

A) The oiling crew is short of a grader operator. (The Grievant) has years of experience on a grader and is the only one available. (He) operates the grader and someone else takes the roller. (Management Rights)

B) (The Grievant) is available to operate the roller, however, a small grader patch needs to be rolled North of Mondovi where the roller is located and (the Grievant) is hauling rock in Fountain City. A Mondovi employee operates the roller. (Management Rights)

C) (The Grievant) is recovering from a serious injury and has a doctors (sic) permission to return to work. He begins to operate the roller, however, his performance and/or safety is still affected and we have someone else operate the roller until he further recovers. (Management Rights)

D) (The Grievant) is available to operate the roller, however, the commissioner assumed he was not available and assigned someone else to the roller. (Management Rights)

...

The Union did not agree with this response and initiated the arbitration process.

The parties, at hearing, stipulated the following facts:

1. The standard work day is from 7:00 a.m. to 3:30 p.m.
2. (The Grievant) was performing Roller Operator duties on County Highway AA near Urne on the morning of June 6, 1996. The Heavy Equipment Operator position includes roller operations but there is no specific Roller Operator position.
3. Robin Secrist is a Gas Man.
4. On the afternoon of June 6, (the Grievant) was on County Highway D near Urne en route to the Waumandee shop.
5. David Brevick, the Highway Commissioner, reviewed the job site on County Highway AA near Urne in the early afternoon.
6. (The Grievant) left County Highway D at approximately 1:30 p.m. and returned to the Waumandee shop.
7. Secrist was at the Alma shop, and was assigned to return to Highway AA to operate the Roller because Brevick wanted the road to be rolled again on June 6.
8. The County Highway AA work was to be rolled again the next day (Friday), weather permitting, but was not rolled until Saturday by (the Grievant).
9. (The Grievant) was off on Friday on sick leave for a medical appointment.
10. The Highway Committee met to review the grievance, but the Union was not present.

The parties also adduced testimony at the arbitration hearing. None of the matters covered in that testimony is disputed.

The Grievant and Secrist are each classified in the position of Heavy Equipment Operator. The Grievant acts as the principal operator of the roller, and Secrist's principal function is Gas Man. Secrist served as the principal operator of the roller prior to the Grievant's assumption of that function roughly eight years ago. The Grievant has greater seniority than Secrist.

The grievance questions events of June 6, 1996. The prior day the Grievant had rolled a portion of County Highway AA near Urne. The day was rainy and, as a result, the mix rolled by the Grievant was soupy. On June 6, the Grievant finished some roller work on County Highway D, then, sometime around 1:15 p.m., called a Foreman, Joe Wiczorek, to determine if there was any more roller work to be done. Wiczorek informed the Grievant that there was no more roller work then ready and that he should shut the roller down. The Grievant did so, then returned to the shop at Waumandee, roughly 26 miles from Urne.

At roughly 3:15 p.m., the Grievant called the shop at Alma. He learned that roller work was then being done on County Highway AA. The Grievant called Brevick to determine what had happened. When Brevick informed him the roadway would be rolled twice, the Grievant offered to do the second rolling. He left work at 3:30 p.m. on June 6. The Grievant had a doctor's appointment set for the following day. His request for sick leave had been approved several days prior to June 6.

Brevick inspected the work on County Highway AA early in the afternoon on June 6. He decided the site would have to be rolled twice more to make the patch acceptable. From his car phone, Brevick called the Urne shop and spoke to Wieczorek. Wieczorek is a member of the bargaining unit. From their discussion, Brevick assumed that the Grievant had left the work site because he did not feel well. He instructed Wieczorek to call Secrist at the Alma shop, so that the County Highway AA site could be rolled that afternoon. The Alma shop is roughly 20 miles from the work site on County Highway AA. Secrist put in one and one-half hours of overtime on June 6 to complete the rolling assigned by Brevick.

Because the weather turned bad on June 7, the second rolling had to be performed on Saturday, June 8. Because he knew the Grievant was available on June 8, Brevick assigned the Saturday work to the Grievant. Brevick acknowledged that if he had realized the Grievant was available to work on June 6, he probably would have assigned the work to the Grievant.

Brevick noted that a principal operator may spend 95% of his time on the same piece of equipment. However, he also noted it was not unusual for Heavy Equipment Operators to work on whatever piece of equipment a given job required, whether it was his principal machine or not. Brevick has worked for the County for roughly eleven years, and noted that the practice of having one employe responsible, to the fullest extent possible, for a single piece of equipment had been in effect throughout his employment.

It is undisputed that in the bargaining which produced the 1996-98 labor agreement, the Union made the following proposals:

1) Article VII - Section 3

Amend to "Overtime shall be granted according to seniority."

...

12) Article XVIII - Add a new Section

"Each separate piece of heavy equipment shall have one (1) principal operator."

...

The parties attempted, in bargaining, to codify their practice in a way which stated the rights of a principal operator, but preserved the County's flexibility to respond to operational needs. The various proposals and counter proposals grew in length and complexity until the parties decided the attempt to clarify the practice yielded something less than clarity. The agreement was not amended to reflect Union proposals 1) and 12).

Further facts will be set forth in the DISCUSSION section below.

THE PARTIES' POSITIONS

The Union's Brief

After a review of the evidence, the Union notes that it is undisputed that the Highway Committee rendered its decision without permitting the Union to present its case. The Union contends that "it is hardly fair and unbiased for the Highway Commissioner to present the Union's grievance to the Highway Committee."

Turning to the merits, the Union asserts that "the primary operator of a piece of equipment . . . should be assigned to operate that piece of equipment when the operator is available." This reflects, the Union concludes, an understood practice. A review of the evidence establishes that the County's concern that it have some flexibility in assigning equipment is not at issue here. Rather, the grievance poses "inaccurate communications or a misunderstanding of the available work force on June 6th."

The evidence makes it apparent that had "Brevick known (the Grievant) was available to perform the rolling on Highway AA, (the Grievant) would have been assigned said duties because that was the practice." The Commissioner thus made a mistake and has refused to correct it. The Union concludes that the grievance should be sustained, and that the Arbitrator should order the County to assign Operators, when available, to their primary piece of equipment. Beyond this, the Union "requests that (the Grievant) be awarded one and one-half (1 1/2) hours of overtime for June 6, 1996."

The County's Brief

After a review of the evidence, the County argues that "(t)he Grievant has not followed the contractual grievance procedure" by failing to specify "the specific section of the agreement alleged to have been violated." The County acknowledges the "the issue of arbitrability was not raised by the Employer throughout the grievance process." The County argues, however, that the Grievant's failure to comply with the grievance procedure "not only limits the Arbitrator's jurisdiction . . . but also lends credence to the fact that there is nothing for the Union to point to in support of this grievance." Arbitral precedent confirms that the grievance is "not properly before the Arbitrator."

The failure of the grievance to cite a contract provision manifests, according to the County, that "there simply is no language in the contract" requiring the County to assign the overtime to the Grievant. To find a violation would, the County argues, violate Article V.

Even if the grievance could be considered arbitrable, the County contends that Article VII, Section 3 cannot be read to require it to assign the disputed overtime to the Grievant. The labor agreement neither requires that a particular employe be assigned overtime or that overtime be assigned based on seniority. Nothing in the evidence will supply any more support for the Union's position than the labor agreement. If anything, the evidence demonstrates Brevick's good faith in making the assignment and the soundness of his business reasons for doing so.

A review of the parties' bargaining history underscores that the Union lacks a contractual basis for the grievance. Its proposals manifest that it seeks to gain through arbitration what it failed to gain in negotiation. Acknowledging that "(t)here is no dispute that most machines have a principal operator" and that "the principal operator runs the machine the great majority of the time," the County contends that the grievance cannot be granted without creating an obligation never agreed upon in negotiation.

Nor will the evidence establish a procedural violation by the County. Step 3 "does not require that the Highway Committee meet with either the Grievant or the Union." The labor agreement requires the Highway Committee to do no more than investigate the grievance, and the County did so. Viewing the record as a whole, the County "requests that the Arbitrator dismiss this grievance in its entirety."

DISCUSSION

The issue on the merits of the grievance is stipulated, but the parties pose two threshold, procedural issues. The County contends that the failure of the grievance to list "the specific section of the agreement alleged to have been violated" violates Article V, Section 2. The Union contends that Brevick's presentation of the grievance to the Highway Commission fails to comply with Step 3 of Article V, Section 4.

Each alleged violation has merit, but neither can, standing alone, resolve the merits of the grievance. The County accurately notes that the grievance form fails to comply with Article V, Section 2. The grievance form does not state any entry demanding "the specific section of the contract alleged to have been violated." Nor do the handwritten entries on the form contain this information. Article V does not specify a sanction for this omission, and the County did not object to the omission prior to hearing. The evidence establishes the parties processed the matter informally, and restricted their discussions to the merits of the grievance. Against this background, it is more persuasive to treat the omission as evidence concerning the

merits of the grievance than as a jurisdictional point. The level of formality in pleading argued for by the County has no basis in the evidence, and such formality should not unnecessarily be forced into a bargaining relationship.

Similar considerations govern the Union's contentions. The County forcefully argues that Step 3 requires only that the "Highway Committee . . . further investigate the grievance and submit a decision in writing." This ignores, however, that Step 3 states that the "grievant and/or a representative may submit it to the Highway Committee." Presumably, the "may" indicates that not every grievance must be advanced to Step 3. The County's arguments, however, gloss over the linkage of "submit" to "the grievant and/or a representative." In this case, Brevick appears to have made the submission. However, the Union's procedural contention, like the County's, ignores the informality of the processing of the grievance and the parties' focus on the merits. Here too, whatever procedural weakness exists in the processing of the grievance fails to dictate a conclusion independent of the evidence on the merits of the grievance. The presentation of the Union's case at hearing remedied any loss traceable to Step 3.

The merits of the grievance turn on past practice. Past practice can serve as a guide for the interpretation of ambiguous contract language or, conceivably, as the source of an independent contractual obligation. The County contends that it cannot, under this agreement, serve the latter role.

The County's arguments have considerable persuasive force. Article VII does not grant assignment of overtime based on seniority or on status as principal operator. Articles V and XXII underscore that the grievance must have a contractual footing. However, the force of the County's arguments cannot obscure that Section 2 of Article IV precludes County use of its management rights "in a manner that will cease to grant privileges and benefits the employees enjoyed prior to adoption of this Agreement and that are not incorporated herein." Brevick's testimony and his June 24, 1996 response to the grievance acknowledge the existence of a past practice concerning the assignment of overtime.

That the grievance has a contractual foundation does not, however, address the soundness of that foundation. The evidence clarifies that the practice is ill-defined. It is apparent the County attempts to assign work to principal operators. It is no less apparent it is not compelled to do so in every case.

The issue thus turns on whether the County should be compelled to award the June 6 overtime to the Grievant. The evidence will not support the Union's assertion that it can be so compelled. Brevick acknowledged he would have assigned the work to the Grievant had he known the Grievant was available. The fault for this misunderstanding cannot be laid at Brevick's feet. Wieczorek did not testify, and it is not apparent what was said between Brevick and Wieczorek on June 6. It is, however, apparent that Brevick believed that the Grievant was not available due to illness. That the Grievant had approved sick leave for June 7 makes this belief understandable.

Brevick's mistake was, then, made in good faith and after consultation with a unit member. It is impossible to base a contract violation on this action. At the time Brevick acted, he assigned the nearest available roller operator to the job. This is within the scope of the practice the Union seeks to use as a basis to compel payment. The parties acknowledge the County can consider its operational needs in assigning Heavy Equipment Operators to machinery. On the afternoon of June 6 Secrist was well into the work on County Highway AA before Brevick was made aware of the Grievant's availability. Nothing in the evidence would suggest any basis in contract or practice to support a conclusion that Brevick was under an obligation to suspend the work on County Highway AA until the Grievant could make the roughly one hour trip from Waumandee to Urne. That Brevick acted on a misunderstanding is arguably more traceable to Wieczorek than to Brevick. When the Grievant informed Brevick of his availability, Brevick responded by assigning him the second half of the rolling operation. Against this background, it is impossible to conclude the County abused its Article IV rights.

If the County had attempted to disavow the practice acknowledged by Brevick the answer might be different. Here, however, the Union seeks to gain more from the practice than the evidence will support. Brevick did no more on June 6 than he had done in the past by considering the availability of a principal operator and the County's operational needs when he assigned Secrist to perform roller work on June 6.

That the Union failed to secure proposals 1) and 12) in the bargaining which produced the agreement governing the grievance has no bearing on the conclusions stated above. The clarity the Union sought to gain through those negotiations proved impossible. This does not dictate the conclusion that there is no practice. However, the evidence will not support the clarification of the practice the Union seeks to gain through this arbitration. The evidence will not permit the practice to be stretched to cover this grievance.

AWARD

The County did not violate the collective bargaining agreement by assigning the Gas Man to perform overtime roller operations on Thursday, June 6, 1996, rather than the Grievant.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 17th day of November, 1997.

Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator

RBM/mb

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